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No. 317

In the Supreme Court of the United States

OCTOBER TERM, 1958

RUTH DAVIS, as Administratrix for JOHN F. DAVIS, Deceased, Trustee of the Estate of CUMSEH BEAR, Deceased, PETITIONER

v.

MARY JONES, Administratrix of the Estate of CUMSEH BEAR, Deceased; ALICE BEAR, Guardian of JANIE ALENE BEAR; ROSINA LOUISE BEAR, JOHN ALLEN BEAR and IVAN EUGENE BEAR, Minors; and UNITED STATES OF AMERICA

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINIONS BELOW

The District Court did not write an opinion. The opinion of the Court of Appeals (Pet. 13-20) is reported at 254 F.2d 696.

JURISDICTION

The judgment of the Court of Appeals was entered on April 11, 1958. A timely petition for rehearing

was denied on May 8, 1958. The time for filing a petition for a writ of certiorari was extended, by order of Mr. Justice Whittaker, dated July 29, 1958, to September 1, 1958. The petition was filed on August 28, 1958. The jurisdiction of this Court is invoked under 25 U.S.C. 1254(1).

QUESTION PRESENTED

Whether this suit charging a trustee with maladministration of a trust was properly removed to the federal district court under Section 3 of the Act of April 12, 1926, 44 Stat. 239, which provides for removal from the Oklahoma courts of suits involving restricted Indians claiming an interest in allotted lands or the income therefrom.

STATUTES INVOLVED

Section 3 of the Act of April 12, 1926, 44 Stat. 239, provides in part:

> Any one or more of the parties to a suit in the United States courts in the State of Oklahoma or in the State courts of Oklahoma to which a restricted member of the Five Civilized Tribes in Oklahoma, or the restricted heirs or grantees of such Indian are parties, as plaintiff, defendant, or intervenor, and claiming or entitled to claim title to or an interest in lands allotted to a citizen of the Five Civilized Tribes or the proceeds, issues, rents, and profits derived from the same, may serve written notice of the pendency of such suit upon the Superintendent for the Five Civilized Tribes, and the United States may appear in said cause within twenty days thereafter, or within such extended time as the

> trial court in its discretion may permit, and after such appearance or the expiration of said twenty days or any extension thereof the proceedings and judgment in said cause shall bind the United States and the parties thereto to the same extent as though no Indian land or question were involved. * * * *Provided*, That within twenty days after the service of such notice on the Superintendent for the Five Civilized Tribes or within such extended time as the trial court in its discretion may permit the United States may be, and hereby is, given the right to remove any such suit pending in a State court to the United States district court by filing in such suit in the State court a petition for the removal of such suit into the said United States district court, to be held in the district where such suit is pending, together with the certified copy of the pleadings in such suit served on the Superintendent for the Five Civilized Tribes as hereinbefore provided. * * *

Other statutes noted in the text are set forth in the Appendix, *infra*, pp. 8-9.

STATEMENT

John F. Davis, trustee of the estate of Cumseh Bear, deceased, filed a petition in the Okfuskee County Court, Oklahoma, seeking approval and confirmation of his trustee's report and an adjudication of no liability to the trust estate except that disclosed by the report—which showed a balance in the account of $1,261.72. The surviving heirs of Cumseh Bear, all restricted Indians, filed objections and exceptions to the report, and cross-petitioned for an

accounting. Notice of the suit was served upon the United States pursuant to Section 3 of the Act of April 12, 1926 (*supra*), and the Government seasonably removed the case to the United States District Court. A motion to remand by Davis was denied. Acting on its own behalf and on behalf of the heirs of Cumseh Bear, the United States filed its complaint in intervention seeking an accounting.

The trust agreement had been executed in 1932 between Cumseh Bear, a restricted full-blood Creek Indian, settlor, and John F. Davis, Chief of the Creek Tribe, trustee, and was subsequently approved by the Okfuskee County Court. Under the agreement, Davis took legal title to certain lands which Cumseh had inherited from his wife, the original allottee thereof. These lands were subject to an outstanding approved lease conferring upon the lessee the right to extract oil and gas. Davis was to collect and manage the royalty income derived from the lease and to use it for the sole benefit of Cumseh. The trust was revocable and was to terminate at Cumseh's death. During the trust period, there was income amounting to some $57,000. Cumseh died in 1954, and this trustee's action followed.

Upon the evidence, the District Court found that the settlor, an illiterate man, had reposed full confidence in the trustee, who, in addition to being chief of the tribe, was a law graduate, a minister and a real estate agent; that Davis, during his administration of the trust, diverted some $31,000 of trust income; that Davis' efforts to show that this sum had been expended for trust purposes were unworthy of

belief and rested on subterfuge; and that the settlor, Cumseh, neither understood nor ratified the breaches of trust which had occurred. A judgment surcharging the trustee was entered, and the Court of Appeals affirmed.

ARGUMENT

The concurrent findings of the courts below as to maladministration of the trust are not directly challenged in the petition and, in any event, they present no issue appropriate for determination by this Court. As to the question whether the case was properly removed to the United States District Court, we submit that the decision below was clearly correct. Moreover, contrary to petitioner's suggestion, there is no conflict of decisions and the case lacks general importance.

Section 3 of the 1926 Act (*supra*, p. 2) explicitly provides for removal when a restricted Indian claims an interest in allotted lands or the proceeds therefrom. *House* v. *United States*, 144 F. 2d 555, 559 (C.A. 10), certiorari denied, 323 U.S. 781. There is no dispute that the heirs of Cumseh Bear are restricted Indians. Moreover, the lands which he left to his heirs are allotted lands and the sums here involved are proceeds therefrom. It is immaterial that Cumseh Bear provided, during his life, that the income derived from exploitation of the oil and gas resources was to be managed by a trustee.

Petitioner's position is not aided by reference to Section 9 of the 1908 Act, as amended (*infra*, p. 8). That section provides that a full-blooded Indian who inherited allotted lands (a description fitting Cum-

seh Bear) might make a conveyance of such lands, or of an interest therein, by obtaining the approval of the appropriate county court. However, the Court of Appeals properly concluded, consistently with its earlier decisions in *Chisholm* v. *House*, 160 F. 2d 632, and *Bradburn* v. *Shell Oil Co.*, 173 F. 2d 815, that the establishment of a revocable trust, for the purpose of securing management of the income from allotted property, does not constitute a conveyance or alienation of an interest in the sense of the 1908 Act. Thus, even assuming that the trust was valid,[1] the property nevertheless remained restricted and the removal provision of the 1926 Act was properly held applicable.

This statutory provision is confined to actions instituted in the state courts of Oklahoma involving claims by restricted members of the Five Civilized Tribes in Oklahoma. The issue presented by this case can arise only in the Tenth Circuit. Moreover, in the form that it is here presented, the issue is unlikely to prove recurrent. Arrangements of trusteeship on behalf of restricted Indians of the Five Civilized Tribes have been regulated by specific act of Congress since 1933 (see Act of January 27, 1933, *infra*, pp. 8-9), the year following establishment of the trust involved in this case.

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[1] The assumption is not free from doubt. See Section 2 of the Act of January 27, 1933, *infra*, p. 9.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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Solicitor General.

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Attorneys.

SEPTEMBER 1958.

APPENDIX

Section 2 of the Act of May 27, 1908, 35 Stat. 312, provides, in part:

> * * * *Provided*, That leases of restricted lands for oil, gas or other mining purposes, leases of restricted homesteads for more than one year, and leases of restricted lands for periods of more than five years, may be made, with the approval of the Secretary of the Interior, under rules and regulations provided by the Secretary of the Interior, and not otherwise: * * *

Section 9 of the Act of May 27, 1908, 35 Stat. 312, as amended by the Act of April 12, 1926, 44 Stat. 239, provides, in part:

> The death of any allottee of the Five Civilized Tribes shall operate to remove all restrictions upon the alienation of said allottee's land: *Provided*, That hereafter no conveyance by any full-blood Indian of the Five Civilized Tribes of any interest in lands restricted by section 1 of this Act acquired by inheritance or devise from an allottee of such lands shall be valid unless approved by the county court having jurisdiction of the settlement of the estate of the deceased allottee or testator: * * *.

Section 1 of the Act of January 27, 1933, 47 Stat. 777, provides, in part:

> That all funds and other securities now held by or which may hereafter come under the supervision of the Secretary of the Interior, belonging to and only so long as belonging to Indians of the Five Civilized Tribes in Oklahoma of one-half or more Indian blood, enrolled or unen-

rolled, are hereby declared to be restricted and shall remain subject to the jurisdiction of said Secretary until April 26, 1956, subject to expenditure in the meantime for the use and benefit of the individual Indians to whom such funds and securities belong, under such rules and regulations as said Secretary may prescribe: * * *.

Section 2 of the Act of January 27, 1933, *supra*, provides, in part:

> The Secretary of the Interior be, and he is hereby, authorized to permit, in his discretion and subject to his approval, any Indian of the Five Civilized Tribes, over the age of twenty-one years, having restricted funds or other property subject to the supervision of the Secretary of the Interior, to create and establish, out of the restricted funds or other property, trusts for the benefits of such Indian, his heirs, or other beneficiaries designated by him, such trusts to be created by contracts or agreements by and between the Indian and incorporated trust companies or such banks as may be authorized by law to act as fiduciaries or trustees: * * * *Provided further*, That all trust agreements or contracts made or entered into prior to the date of approval of this Act, and all contracts or agreements made or entered into prior to said date providing for or looking to the creation of such trust or trusts shall be null and void unless such contracts or agreements shall have heretofore been approved by the Secretary of the Interior.

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